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No. 02-544

In The

Supreme Court of the United States

JIM HODGES, Governor of the State of South Carolina, in his official capacity,

Petitioner,

v.

SPENCER ABRAHAM, Secretary of the Department of Energy, in his official capacity, and the UNITED STATES DEPARTMENT OF ENERGY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* SIERRA CLUB, ENVIRONMENTAL WORKING GROUP AND PUBLIC CITIZEN IN SUPPORT OF THE PETITIONER

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INTERESTS OF THE *AMICI*

Amici Curiae, the Sierra Club, Environmental Working Group (EWG) and Public Citizen respectfully submit this brief in support of the petition for writ of certiorari to the Fourth Circuit filed by South Carolina Governor Jim Hodges.[1] Public Citizen is a non-profit consumer advocacy group with approximately 125,000 members nationwide. The Sierra Club is a membership-based non-profit organization devoted to exploring and enjoying the wild places of the earth and to promoting the responsible use of the Earth's ecosystem and resources. EWG is a non-profit environmental research organization dedicated to improving public health and protecting the environment by reducing pollution in air, water, and food. *Amici Curiae* are organizations dedicated to advocating the public interest in protecting health and the environment, especially with respect to nuclear waste management issues. We are concerned that if *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002) (*Hodges*), is allowed to stand, judicial review of arbitrary and capricious actions by federal officials against sovereign states will be compromised, including actions undermining the ability of the states to protect public health. The circuits are split on this crucial question and in need of Supreme Court guidance. To avert these repercussions, which directly affect our members and are

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[1] Pursuant to United States Supreme Court Rule 37.6, we submit that counsel for *amici curiae* authored the brief in its entirety. No person or entity aside from *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Governor Hodges, Secretary Abraham, and the Department of Energy have granted consent for Sierra Club, Environmental Working Group and Public Citizen to file this brief

central to our organizational missions, we submit this brief.

SUMMARY OF ARGUMENT

The United States Department of Energy's (DOE's) decision to establish the Savannah River Site (SRS) as the sole long-term storage site for weapons-grade plutonium violated the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the Defense Authorization Act for Fiscal Year 2002. The *Amici* agree with Governor Hodges that DOE's action violated NEPA and support his petition on those issues. However, because of the broader national implications of the Fourth Circuit's misreading of the relationship between NEPA and the APA for the right of citizens to be protected from arbitrary and capricious government action, this brief focuses on the APA claims.

DOE's action was arbitrary and capricious under the APA and the Defense Authorization for Fiscal Year 2002. DOE's change in policy on the long-term storage of plutonium at SRS was a sudden, significant, and unexplained departure from precedent and was evidently motiviated by improper considerations. In addition, DOE's action was arbitrary and capricious because the new policy failed to develop an exit strategy for plutonium for SRS as required by the Defense Authorization bill for Fiscal Year 2002. Because DOE has not made any plans to move the plutonium waste out of permanent storage, its decisions with respect to SRS will create a major disincentive to minimize or more safely manage plutonium waste.

NEPA procedure does not supplant the APA's requirements for judicial review. NEPA procedure expressly supplements other law and does not repeal any other statute by implication. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the Supreme Court concluded NEPA could not be the basis for a "substantial revision" of the APA. 425 U.S. 519, 548 (1978). Now in *Hodges*, the Fourth Circuit's finding that satisfaction of NEPA's procedural mandate automatically results in satisfaction of the APA's arbitrary and capricious review is a substantive change in the APA.

The APA's jurisdiction over arbitrary and capricious final agency actions serves a fundamentally different purpose than NEPA, which is a procedural statute designed to improve the quality of decision-making. Or, to state the matter tautologically, a decision may violate NEPA but be neither arbitrary or capricious. Conversely, a decision may satisfy NEPA but constitute unquestionably arbitrary and capricious behavior. Only by analyzing such claims separately can congressional intent in crafting these distinct avenues for judicial review be preserved. Other Courts of Appeals understand that NEPA and the APA are separate statutes, and the Fourth Circuit's decision is in direct conflict with their precedents.

The Circuits are split over whether underlying statutes may serve as a substitute for the APA's arbitrary and capricious judicial review. The First Circuit and the Eleventh Circuit correctly understand that claims under the APA are separate from claims under other procedural statutes. The Fourth Circuit in *Hodges*, however, incorrectly conflated the APA with the underlying statute. The Fourth Circuit confused a decision regarding an agency's violation of statutory requirements with a decision

whether the agency's action on the merits was arbitrary and capricious. Where the underlying statute is substantive and directly addresses the bureaucratic conduct at issue, prescribing what is acceptable and what is unacceptable with respect to that conduct, this conflation may well have no more than theoretical implications. When, however, the underlying statute addresses process, as in this case, and does not define the substantive consideration that determines the propriety of the agency's actions, the conflation of the court's analysis has the effect of denying petitioners the judicial review that Congress intended them to have. The latter situation is the posture of this case and it deserves this Court's review.

The Fourth Circuit's finding that satisfaction of NEPA's procedural mandates automatically results in satisfaction of the APA blocks states and their citizens from seeking review of blatantly arbitrary and capricious actions by federal officials who seek to run roughshod over the states' assertion of their sovereignty in the arena of safeguarding public health. The public needs the protection that the APA provides from the admittedly rare but nevertheless destructive actions of bureaucrats acting irrationally. APA review affords the essential opportunity to compel review of such decisions by an independent judiciary, serving as a check and balance when the electoral system operates too slowly or imperfectly to deter such conduct. The APA should have served the state of South Carolina well in keeping the nation's nuclear waste processing policy on track; however, the Court of Appeals for the Fourth Circuit abandoned its role in that process.

STATEMENT OF FACTS

Amici adopt Governor Hodges's Statement of Facts and incorporate them by reference. *See* Brief for Governor Jim Hodges, at 1-15, Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit of *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002) (No. 02-544). Below, we add some additional facts and restate the basic chronology of events.

The challenge of safely treating, recycling, or disposing of dangerous radioactive waste has vexed the United States since it began harnessing atomic energy. Plutonium-239, the material at issue here, has a half-life of 24,000 years. Ralph H. Petrucci, *General Chemistry: Principles and Applications* 955 (5th ed. 1989). This characteristic means that 24,000 years must pass for half of the atoms in any given amount of plutonium to radioactively decay. *Id.* at 944. Exposure to plutonium has caused cancer in laboratory animals and it may weaken the human immune system. Agency for Toxic Substances and Disease Registry & United States Environmental Protection Agency, *Toxicological Profile for Plutonium* 3 (1990). When stored in permeable containers, plutonium can leach and seep into soil and groundwater, and from there into surface waters that pose direct exposure pathways for people not only living near such facilities, but many miles away. *See id.* at 89 (explaining that radioactive waste disposal is one of the methods by which plutonium may enter waterways).

Because of poor storage practices in the past, SRS is now included on the Environmental Protection Agency's (EPA's) National Priorities List (NPL) for environmental

cleanup. National Priorities List for Uncontrolled Hazardous Waste Sites, 40 C.F.R. § 300, App. B (2002). The NPL contains the worst environmental waste disposal sites in the country. *See* 42 U.S.C. § 9605(a)(8)(B) (2000) (directing the President to create a prioritized list of the most contaminated sites in the United States). EPA reports that the site is contaminated with plutonium, uranium, tritium, heavy metals, and volatile organic compounds such as trichloroethylene. United States Environmental Protection Agency, NPL Site Narrative for Savannah River Site (US-DOE), *at* http://www.epa.gov/superfund/sites/npl/nar1242.htm (last modified Oct. 4, 2002).

Additionally, as part of the "Atoms for Peace" program, SRS is also the recipient of spent nuclear power fuel rods from foreign nuclear research reactors. *State of South Carolina ex rel. Beasley v. O'Leary*, 953 F.Supp. 699, 701 (E.D.S.C. 1996). The SRS may receive up to seventy-five percent of spent fuel rods from foreign nuclear power research reactors. *Id.* at 703.

In the context of these ongoing problems, when DOE began the decision-making process just sanctioned by the Fourth Circuit, the Department promised to find treatment or recycling options for the plutonium that entered SRS. *Record of Decision for the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement*, 62 Fed. Reg. 3014 (Jan. 21, 1997). By February 2002, DOE had eliminated the treatment concept. NNSA/DOE, *Disposition of Surplus Plutonium at Savannah River Site* 4-24-27 (Feb. 15, 2002), available at http://www.nci.org/pdf/doe-pu-2142002.pdf. Nevertheless, it remained committed to only temporary storage at SRS. Supplemental Analysis for Storage of Surplus Plutonium in the KAMS Facility 8, D.O.E./E.I.S.-0229-SA2

(Feb. 2002). Two months later, abruptly reversing many years of policy and commitments to the sovereign state of South Carolina, Secretary Abraham issued his ultimatum to Governor Hodges, threatening that if the Governor failed to sign DOE's agreement regarding disposal at SRS, DOE would make SRS the nation's sole and permanent burial ground for weapons-grade plutonium. Letter from Secretary Abraham to Governor Hodges of 4/11/02, Pet. For Cert., App. 102, 106-07. Governor Hodges rejected Secretary Abraham's offer because it was not legally binding, so Secretary Abraham followed through on his threat to issue an amended record of decision. *See* DOE, *Amended Record of Decision, Surplus Plutonium Disposition Plan*, 67 Fed. Reg. 19,432 (Apr. 19, 2002).

Governor Hodges immediately sought review of this decision in the District Court for the District of South Carolina on two grounds. *See Hodges v. Abraham*, No. 1:02-1426-22 (D.S.C. Jun. 17, 2002), *available at* www.scd.uscourts.gov/Orders/Plutonium.pdf. First, he argued that DOE had violated NEPA because the Agency failed to prepare an environmental assessment or supplemental environmental impact statement while making its plans for SRS. *Id.* at 4. He also argued that DOE's decision, more specifically its irrational policy reversal, was arbitrary and capricious under section 706(2)(A) of the Administrative Procedure Act. *Id.* at 5. The district court granted DOE's motion for summary judgment. *Id.* at 45.

On review in the Court of Appeals for the Fourth Circuit, the Governor's claims met a similar fate. With respect to the APA claim, the appeals court noted:

> Governor Hodges also maintains that the DOE's decision making process violated the Administrative Procedure Act (the "APA"). Under the APA,

> we must uphold an agency decision if it is supported by "substantial evidence," and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (E). In conducting our review under the APA, "we perform only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes, and whether the agency has committed a clear error of judgment." *Maryland Dep't of Human Res. v. United States Dep't of Agric.*, 976 F.2d 1462, 1475 (4th Cir. 1992). (internal quotations and citations omitted). In view of the DOE's compliance with NEPA, the Governor's APA challenge is also without merit.

Hodges, 300 F.3d at 449 n.17.

ARGUMENT

I. DOE's Action was Arbitrary and Capricious

DOE's action was arbitrary and capricious under the APA because DOE failed to provide a rational explanation for its significant, sudden, and unexplained change in policy on the long-term storage of plutonium at SRS. "When an administrative agency significantly departs from its precedent" it must make a reasonable explanation for the departure. *Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Commission*, 59 F.3d 284, 290 (1st Cir. 1995) (*citing Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41 (1983)); *Puerto Rico Sun Oil Co. v. USEPA*, 8 F.3d 73, 77 (1st Cir. 1993). Under DOE's precedent, some plutonium at SRS would be converted into fuel for nuclear power plants and other plutonium would be immobilized for transfer to a geologic

site. DOE, *Record of Decision for the Storage and Disposition of Weapons-Usable Fissile Material Final Programmatic Environmental Impact Statement*, 62 Fed. Reg. 3014 (Jan. 21, 1997). From 1996 through 2002, DOE analysis, Records of Decision, and a report to Congress consistently supported a two-track policy with conversion and immobilization. DOE, *Record of Decision*, 62 Fed. Reg. 3014 (Jan. 21, 1997); NNSA/DOE, *Disposition of Surplus Plutonium at Savannah River Site* 4-24-27 (Feb. 15, 2002), *available at* http://www.nci.org/pdf/doe-pu-2142002. Just two months after DOE's 2002 report to Congress, Secretary Abraham suddenly reversed course. After Governor Hodges stated that he would not sign a letter of agreement if Secretary Abraham would not make it legally binding, DOE published a Record of Decision making SRS the site for the long-term storage of plutonium. DOE, *Amended Record of Decision, Surplus Plutonium Disposition Program*, 67 Fed. Reg. 19,432 (Apr. 19, 2002). Such a sudden change in course must be supported by a reasonable explanation in order to survive judicial review under the APA. DOE has not offered such an explanation.

While "arbitrary and capricious" is a legal term of art, Secretary Abraham's action was arbitrary within the ordinary meaning of the term. The American Heritage Dictionary defines arbitrary as "[d]etermined by chance, whim, or impulse, and not by necessity, reason, or principle." AMERICAN HERITAGE DICTIONARY (2000). In an April 11, 2002 letter, Secretary Abraham assured Governor Hodges that DOE was committed to a "credible pathway out" for the plutonium. Pet. for Cert., App. 103. Secretary Abraham then threatened Governor Hodges that DOE would give its 30-day notice to begin shipping plutonium without the negotiated terms protecting that pathway if

Governor Hodges did not sign the agreement. *Id.*, App. 102, 106-107. When Governor Hodges insisted on making the agreement legally binding, Secretary Abraham reversed DOE's policy on long-term storage at SRS. The course of events strongly indicates that Secretary Abraham's action was based on anger and frustration with the negotiation, instead of on a reasoned decision to choose a new long-term plutonium disposal policy.

DOE's reversal was arbitrary and capricious, because the new policy failed to develop an exit strategy for plutonium for the SRS, as required by the Defense Authorization Act for Fiscal Year 2002. In this law, Congress directed DOE to develop a plan for the disposal of plutonium, including the timely removal of plutonium materials from the SRS. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 3155, 115 Stat. 1012, 1378 (2001). Instead, DOE's amended Record of Decision announced the consolidated long-term storage of plutonium at SRS and failed to develop any exit strategy. DOE, *Amended Record of Decision, Surplus Plutonium Disposition Program*, 67 Fed. Reg. 19432 (Apr. 19, 2002).

II. NEPA Does Not Supplant the APA

a. NEPA's Statutory Language and *Vermont Yankee*

By its express terms, NEPA supplements and does not replace any other statute. NEPA states, "The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal Agencies." 42 U.S.C. § 4335. The Supreme Court has also found that NEPA does not repeal any other statute by implication. *Aberdeen & Rockfish Railroad Co. v. SCRAP*, 422 U.S.

218, 319 (1975); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 425 U.S. 519, 548 (1978). In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, the Court considered whether NEPA allowed a court to require an agency to follow additional procedures beyond those required by the APA. 425 U.S. at 548. The Court held that NEPA did not require additional procedures. *Id.* The Court concluded, "[I]t is clear NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA." *Id.* The Fourth Circuit's finding in *Hodges* that satisfaction of NEPA automatically satisfies the APA is a substantive revision of APA procedure and deserves the Court's review.

b. NEPA and the APA Serve Different Purposes

NEPA's procedural obligations are not designed to supplant the APA's obligations. NEPA is a procedural statute designed to create an obligation for an agency to consider the environmental consequences of agency actions. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). To enforce that obligation, NEPA grants a cause of action for adversely affected parties. *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 319 (1975). In comparison, the APA is designed to provide a right to judicial review of "all final agency action for which there is no other adequate remedy. . . . " 5 U.S.C. § 704. NEPA does not give a court power to review general arbitrariness. The APA, by contrast, provides a right of review for "[a] person suffering legal wrong because of agency action, or adversely affected or

aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702.

By confusing NEPA's procedural obligations with the APA's protection against arbitrary and capricious government action, the Fourth Circuit cut off the right to judicial review. By conflating the statutes, the Fourth Circuit removed the APA's substantive protection when it found that DOE satisfied NEPA's procedure.

III. A Circuit Split Exists Over Whether Other Statutes May Substitute for Judicial Review Under the APA's Arbitrary and Capricious Test

a. Decisions Correctly Decided

Several Courts of Appeals decisions support *amici's* interpretation of the law. While one of the following cases involve NEPA claims, others concern the Clean Water Act (CWA) or the Endangered Species Act (ESA). The analysis in these opinions plainly shows that the First and Eleventh Circuits believe the APA's arbitrary and capricious review performs a role separate from reviewing an agency's compliance with an underlying statute.

In perhaps the most strongly worded opinion supporting *amici's* position, the Court of Appeals for the First Circuit considered the EPA's issuance of a pollution discharge permit to Puerto Rico Sun Oil Company. Although the EPA's action conformed with all of the substantive and procedural aspects of the governing statute and regulations, the court still found the permitting decision to be arbitrary and capricious under the APA. *Puerto Rico Sun Oil Co. v. USEPA*, 8 F.3d 73, 74, 81 (1st Cir. 1993). The court wrote:

> EPA's action in adopting the permit in this case is not flawed by procedural mistake. On the contrary, EPA did a commendable job of dotting i's and crossing t's. Nor is there any violation of substantive provisions of the Clean Water Act. . . . The problem with EPA's decision is simply that the outcome appears on its face to make no sense.

Id. at 77. More specifically, the EPA had refused to use a "mixing zone analysis" in granting the permit. *Id.* at 76. This, in and of itself, would have been permissible, but the court noted that the only location where EPA had refused to incorporate such an analysis was Puerto Rico. *Id.* at 78. The court stated that "apparent irrational discrimination" existed in EPA's decision. *Id.* at 78-79. As a result, the court remanded the matter to the agency for reconsideration. *Id.* at 81.

The Court of Appeals for the Eleventh Circuit also recognized that compliance with the underlying statute and compliance with the APA's arbitrary and capricious standard of review are two different questions. In *Sierra Club v. United States Army Corps of Engineers*, Sierra Club challenged the Corps of Engineers' (Corps) and Florida Department of Transportation's (FDOT) construction of a four-lane road running though Hillsborough County Florida. 295 F.3d 1209, 1211 (11th Cir. 2002). The Sierra Club asserted that the Corps had failed to conduct a proper section 7 consultation under the ESA. *Id.* Section 7(a)(2) of the ESA requires federal agencies to ensure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." 16 U.S.C. § 1536(a)(2) (2000). In

order to make this determination, an agency must consult with either the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service before taking action. *Id.* If FWS determines that endangered or threatened species exist in the area of interest, then FWS must perform a biological assessment. *Id.* § 1536(c)(1).

After exploring the intricacies of the ESA, the court found that the Corps had complied with ESA, and for that matter NEPA, when developing the highway. *Sierra Club*, 295 F.3d at 1221. The court then went on to address Sierra Club's arbitrary and capricious claims separately. *See id.* at 1222-23 (explaining that the Corps did not act in an arbitrary and capricious manner by adopting FWS's decision that threatened or endangered species would not be harmed by the highway project). The Eleventh Circuit concluded "[w]e are satisfied that the Corps took a 'hard look' at the environmental consequences of the Suncoast Parkway, *and* that its determinations were not arbitrary and capricious." *Id.* at 1223 (emphasis added).

Finally, in a case that involved nuclear energy issues, *Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Commission*, the First Circuit separately analyzed a Nuclear Regulatory Commission (NRC) decision under NEPA and the APA. 59 F.3d 284, 291-92 (1st Cir. 1995). The First Circuit found that NRC violated NEPA when it allowed Yankee Electric to decommission over 90 percent of a nuclear power plant before conducting a NEPA mandated Environmental Assessment. *Id.* at 292. With regard to the Citizens Awareness Network's APA claim, the First Circuit found that NRC's reversal of its prior decommissioning regulations to allow permanent removal of most major structures and radioactive material prior to the submission of a decommissioning plan was

arbitrary and capricious. *Id.* at 292. Again, the First Circuit realized that an agency's compliance with the underlying statute is a separate consideration from review of the agency's decision under the APA's arbitrary and capricious standard.

b. The Fourth Circuit Creates a Rift Among the Circuits by Incorrectly Conflating the APA's Arbitrary and Capricious Test with Review under the Underlying Statutes

Despite precedents from the First and Eleventh Circuits recognizing the distinctly different purposes served by underlying statutes and the APA, the Fourth Circuit's *Hodges* decision has wrongly conflated an agency's compliance with an underlying statute with satisfaction of the APA's prohibition on arbitrary and capricious administrative decisions. This decision creates a split of opinion among the Circuit Courts of Appeals and *amici* urge this Court to clarify that an agency's decision may comply with the procedural and substantive portions of the underlying statute, but still fail the APA's arbitrary and capricious standard of review. The Courts of Appeals, the states, the administrative agencies, and the people need definitive guidance from this Court that procedurally and substantively complying with an underlying statute does not obviate the need for arbitrary and capricious review under the APA. Given the widely varying subject matter of agency action, the impact of a court, such as the Fourth Circuit, consistently failing properly to use its congressionally bestowed powers under section 706 of the APA could have widespread impact. Without such review, states and private parties would lose their principal

avenue of judicial recourse against federal agencies that inject improper considerations into their decisions.

IV. Importance of APA Review of Substantive Decisions

In a more general sense, plaintiffs need arbitrary and capricious review in order to prevent federal bureaucrats from coming to irrational conclusions in administrative decisions. The Court has long recognized the important role of arbitrary and capricious review to prevent both irrational and improperly motivated agency action. The Court clearly stated this principle when it defined the scope of the arbitrary and capricious standard of review:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on *factors which Congress has not intended it to consider*, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (emphasis added). The Court's admonition regarding use of "unintended" factors encompasses those administrative officials who make politically charged decisions when Congress did not intend for politics to play a part in those decisions. While admittedly rare, cases in which agencies have incorporated illegal considerations into their adjudications do exist.

For example, in *Midwater Trawlers Co-operative v. Department of Commerce*, another case involving the

prerogatives of sovereign states, the states of Oregon and Washington challenged a National Marine Fisheries Service (NMFS) regulation that allocated increased fishing rights for Pacific whiting to four Indian tribes. 282 F.3d 710, 714 (9th Cir. 2002). Because the Court of Appeals for the Ninth Circuit found that NMFS had made a political judgment rather than evaluating the scientific merits of the allocation options, the court deemed the regulation to be arbitrary and capricious – NMFS had relied on factors that Congress did not intend it to consider. *Id.* at 720-21.

Similarly, in *Latecoere International, Inc. v. United States of America Department of the Navy*, the Court of Appeals for the Eleventh Circuit found a U.S. Department of the Navy decision was arbitrary and capricious because it had awarded a defense contract to an American contractor that was otherwise unqualified, while denying that contract to a qualified French contractor (Latecoere). 19 F.3d 1342, 1357-59 (11th Cir. 1994). The court ruled that the Navy had been irrational and had illegally exhibited bias against Latecoere because of the Navy's concerns about the political ramifications of hiring a French company over an American company. *Id.* 1364-65. In reaching its decision, the Court of Appeals for the Eleventh Circuit employed the APA's arbitrary and capricious standard of review to remove illegitimate political considerations from the Navy's decision. *Id.* at 1355, 1364-65. The court recognized that failing to provide relief against the agency's action "would, in effect, repeal Congress' grant of jurisdiction via the APA." *Id.* at 1356 (quoting *Shoals Am. Indus., Inc. v United States*, 877 F.2d 883, 889 (11th Cir. 1989)).

V. Large Scale Impact of *Hodges v. Abraham* on the Nation's Nuclear Policies

Aside from its general removal of a judicial check on agency decision making, *Hodges* has a direct impact on our nation's treatment and storage of nuclear waste. By allowing SRS to become a long-term dumping ground for weapons grade plutonium, DOE eliminates an incentive to quickly process the waste because storage considerations no longer exert pressure to keep pace with the aggregate inbound waste stream. DOE's decision regarding SRS sidesteps this important nuclear waste policy objective.

Besides being poor policy, DOE's action disregards the will of Congress. Congress had directed DOE to develop a plan that would cause "all such defense plutonium and defense plutonium materials [to] be removed in a timely manner from the Savannah River Site for storage or disposal elsewhere." National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 3155(c)(4), 115 Stat 1012, 1378 (2001). DOE's plan to keep nuclear waste at SRS for up to fifty years hardly complies with the "timely" removal requirement. Reuse of plutonium and disposal at a site other than SRS are the overarching policies embodied in section 3155 of the National Defense Authorization Act. DOE failed to embrace those goals in allowing long term plutonium storage at South Carolina's Savannah River Site.

CONCLUSION

This Court should grant the petition for certiorari and reverse the Court of Appeals for the Fourth Circuit's decision. DOE's action was arbitrary and capricious.

Beyond the implications for the Savannah River Site and its environs, the decision incorrectly allows NEPA to supplant APA judicial review. The Circuits are split over whether other statutes may serve as a substitute for the APA's arbitrary and capricious review. In addition, allowing satisfaction of a procedural statute to replace APA review cuts off the right of sovereign states and aggrieved persons to seek judicial review of unreasonable government action. The Fourth Circuit's decision may have a broad impact on future NEPA decisions as well as decisions under other statutes. This case's subject matter warrants the highest level of protection for the people of South Carolina. If allowed to stand, the decision could deter the development of alternatives to permanent storage of plutonium waste.

Respectfully submitted,

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